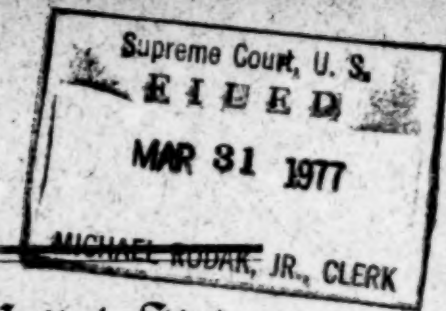


No. 76-1070



In the Supreme Court of the United States

OCTOBER TERM, 1976

EUGENE L. SMALDONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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The opinion of the court of appeals (Pet. App. A) is reported at 544 F. 2d 456. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1976. The petition for a writ of certiorari was filed on February 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is entitled to have his conviction set aside on collateral attack because the government did not produce the report of an interview with a government witness.

STATUTORY PROVISION INVOLVED

The Jencks Act, 18 U.S.C. 3500, provides in pertinent part:

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. * * *

* * * * *

(e) The term "statement" * * * means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; * * *.

STATEMENT

1. Following a jury trial in November 1972 in the United States District Court for the District of Colorado, petitioner was convicted of conspiracy to import cocaine, in violation of 21 U.S.C. 963. He was sentenced to ten years' imprisonment and fined \$10,000. The court of appeals affirmed (484 F. 2d 311), and this Court denied review (415 U.S. 915) (Pet. App. 1a).

The evidence, in summary, showed that petitioner and Larry Merkowitz, a pharmacist, arranged for Craig Mundt,

Ronald Greenspan, and Ronald Nocenti to purchase cocaine in Peru and to deliver it to them in the United States. With the assistance of Nocenti, who was a paid government informant, federal agents arrested petitioner and Merkowitz as they took delivery of samples of the cocaine (Pet. App. 2a-3a). Merkowitz pleaded guilty to one count of conspiracy to import cocaine, and he and Nocenti testified as prosecution witnesses at petitioner's trial.

According to Merkowitz, he advised petitioner in April 1972 of a scheme to import cocaine from Peru, and petitioner stated that he would be interested in investing in the venture. On May 4, 1972, Merkowitz took Nocenti to Mundt's ranch to meet Mundt and Greenspan. The next night Merkowitz told petitioner that Mundt, Greenspan, and Nocenti had made arrangements for a trip to Peru and that the cocaine would cost \$6,500 per kilo. Petitioner agreed to purchase one and one-half kilos and thereafter delivered \$9,750 to Merkowitz, who contributed an equal amount. The sum was given to Nocenti for transportation to Peru, where by pre-arrangement he met Mundt and Greenspan. After Nocenti returned from Peru on May 29, 1972, petitioner informed Merkowitz that Nocenti was back in town. When Merkowitz met Nocenti to receive delivery of the drugs, he was arrested (484 F. 2d at 314-315).

Nocenti corroborated Merkowitz' admissions by testifying that he had been involved in a narcotics organization with Merkowitz, Mundt, and Greenspan in the spring of 1972 and that in furtherance of that enterprise he had gone to Peru on May 11, 1972, and had returned on May 29. Nocenti also testified about two conversations he had had with petitioner on May 30, 1972. The first was a mid-afternoon telephone call, which was recorded with Nocenti's consent and was conceded by petitioner to be an accurate recording of his voice. It tended to connect petitioner to the

conspiracy and to confirm that he was later to receive a sample of the cocaine for testing. The second conversation occurred during the evening of May 30. At that time, Nocenti gave petitioner an envelope containing cocaine and petitioner agreed to have the cocaine tested for quality and to telephone Nocenti at his home. It was at this point that petitioner was arrested (484 F. 2d at 315).

Petitioner contended at trial that Nocenti had gone to federal agents with an offer to "set him up." During cross-examination, petitioner's counsel asked Nocenti whether he had approached the Federal Bureau of Investigation with an offer to "frame" or "set up" petitioner. Nocenti responded that petitioner's name had been mentioned in a conversation between him and F.B.I. Agent Don Lyons but denied that he had offered to put petitioner in jail for a price. Counsel did not further pursue the inquiry with respect to Nocenti's conversations with the F.B.I.

Petitioner's counsel then established that, subsequent to his visit to the F.B.I., Nocenti went to the Bureau of Narcotics and Dangerous Drugs and talked to Agent Wayland Spears. After Nocenti testified that petitioner's name had not been mentioned in this conversation with Agent Spears, counsel inquired about subsequent conversations Nocenti had with that agent. When the district court refused to permit this inquiry, counsel moved for the production of any B.N.D.D. reports "concerning the conference between Mr. Nocenti and Mr. Spears * * *" (Tr. 316). The court denied the motion on the grounds that petitioner's counsel had had ample opportunity to make the request prior to trial and had failed to establish the existence of a report of a conversation between Agent Spears and Nocenti. Counsel then proceeded to another topic without asking Nocenti about subsequent conversations he may have had with other B.N.D.D. agents.

On direct appeal, petitioner contended that the district court had erred in refusing to order production of pretrial statements made by Merkwitz, but he raised no similar claim in regard to Nocenti. In July 1975, however, petitioner moved to vacate his sentence under 28 U.S.C. 2255 on the ground that the government had withheld material producible both under the Jencks Act, 18 U.S.C. 3500, and under *Brady v. Maryland*, 373 U.S. 83, when it failed to turn over the report of an interview of Nocenti that had been conducted by B.N.D.D. Agent Donald Farabaugh on March 1 and 6, 1972, which was approximately one month before petitioner was alleged to have joined the conspiracy.¹ The report indicated that Nocenti had told the agent that he had borrowed money from petitioner (through Michael Tomeo) and that Nocenti had mentioned petitioner as a person who was engaged with others in drug trafficking. Petitioner contended that the report was *Brady* or Jencks material because it would have supported his contention that Nocenti had offered his services to B.N.D.D. in an effort to frame him. Moreover, petitioner argued that the report would have corroborated his testimony that, when Nocenti handed him the envelope containing the cocaine on May 30, 1972, Nocenti told him that it actually was the money he owed Tomeo, which Nocenti asked petitioner to deliver to Tomeo.

The district court denied relief. It found (Pet. App. 36a), and the court of appeals agreed (*id.* at 11a), that the report was not exculpatory, could not have been used for impeachment of Nocenti since Nocenti did not testify

¹The interview report is reprinted at Pet. App. C. Petitioner became aware of the report when it was produced in connection with the trial of co-defendant Mundt.

about the Tomeo loan, and contained "information extraneous to any conspiracy to import cocaine from Peru or any attempt to 'frame' [petitioner]." *Ibid.*

ARGUMENT

Petitioner contends that the district court erred in refusing to vacate his sentence under 28 U.S.C. 2255 because the government failed to produce the report of Agent Farabaugh's interview of Nocenti. The court of appeals correctly concluded, however, that the report was not producible either under the Jencks Act or the rule of *Brady v. Maryland, supra*, and that the absence of the report did not deny petitioner a fair trial.

Even assuming that Agent Farabaugh's report constituted "a substantially verbatim recital of an oral statement made by" Nocenti, the report did not fall within the Jencks Act since it did not relate "to the subject matter as to which [Nocenti had] testified." See, e.g., *Scales v. United States*, 367 U.S. 203, 258; *United States v. Pennett*, 496 F. 2d 293 (C.A. 10). Nocenti did not testify at trial about the loan from Tomeo (Pet. App. 11a).² Moreover, as both lower courts found, the mere fact that Nocenti may have mentioned petitioner's name during the interview was not unusual in the circumstances and was irrelevant to petitioner's unsupported claim that Nocenti intended to frame him (*id.* at 11a, 36a). See *United States v. Giuliano*, 348 F. 2d 217, 223 (C.A. 2), certiorari denied, 382 U.S. 939.

Nor was the allegedly exculpatory information in the report material within the meaning of *Brady v. United*

²Indeed, since the report indicated that Nocenti had borrowed the money from petitioner, rather than from Tomeo (Pet. App. 39a), it did not even corroborate petitioner's version of the May 30, 1972, events.

States, supra. As this Court stated in *United States v. Agurs*, 427 U.S. 97, 112, where, as here, the defendant has not made a specific *Brady* request, the proper standard for assessing whether the government's failure to disclose evidence in its possession has deprived the defendant of due process is whether "the omitted evidence creates a reasonable doubt that did not otherwise exist * * *." Here, wholly apart from Nocenti's testimony, petitioner's willing participation in the conspiracy was demonstrated by the tape recording of his conversation with Nocenti and by the testimony of Merkowitz. Furthermore, even without knowledge of the interview report, petitioner was able to establish the existence of the loan from Tomeo to Nocenti³ and to make the same arguments at trial about the significance of the loan and the possibility of Nocenti's having framed him that he now presents. Access to the report would have added nothing substantial to either of these claims. In sum, since "there is no reasonable doubt about [petitioner's] guilt whether or not the additional evidence is considered" (*United States v. Agurs, supra*, 427 U.S. at 112-113), petitioner was not entitled to vacate his sentence under Section 2255.⁴

³In addition to petitioner's own testimony about the matter, Tomeo admitted at trial—and the government never disputed—that Nocenti had borrowed money from Tomeo (Pet. App. 33a).

⁴Petitioner's related claim that the government knowingly suppressed Nocenti's statements to Agent Farabaugh was correctly rejected by the court of appeals (Pet. App. 17a-21a). In any event, as the Court noted in *Agurs*, "[if] the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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